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No. 85-1708

In The
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE JICARILLA APACHE TRIBE, PUEBLO OF ISLETA, AND PUEBLO OF SANTA ANA AS AMICI CURIAE IN SUPPORT OF THE APPELLEES

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TABLE OF CONTENTS

	Page
TABLE OF CASES	iv-v
TABLE OF AUTHORITIES	v-vi
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2-4
ARGUMENT	4
I. THE SUPREMACY CLAUSE PREEMPTS THE APPLICABILITY OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS	4
A. The Indian Commerce Clause and the Appropriate Analytical Framework	4
B. The "Balancing Test" Advocated by Appellee is not a "Particularized Inquiry" Properly Within a Constitutional Framework.	4
1. The Unrestrained Application of an Abstract "Balancing Test" will Destroy Fundamental Principles of Federalism Embodied in the Constitutionally Defined Relationships Between the United States, Indian Tribes, and the States	7
2. If Adopted, California's Abstract "Balancing Test" Will Have Unforeseen and Unnecessary Impact Upon the Continued Validity of Many Federal Treaties, Statutes and Policies.	8
C. The Post-Proposition 13 Era and the Utilization of Non-Traditional Methods to Raise Governmental Revenues.	10
D. The State Interest Articulated by California Makes a Compelling Argument in Support of the Need for Legislation by	

TABLE OF CONTENTS

Page

Congress to Regulate Indian Commerce Involving Gambling; Abandonment of Long-Standing Fundamental Principles of Jurisdiction is Neither Necessary nor Prudent to Address the State Interest. 11

II. PUBLIC LAW 280 DOES NOT AUTHORIZE THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS WHERE THE STATE PERMITS BUT REGULATES A PARTICULAR GAMBLING ACTIVITY; IF THE COURT SHOULD DISAGREE WITH THE NINTH CIRCUIT'S PUBLIC LAW 280 ANALYSIS THEN THIS COURT'S RULING SHOULD BE LIMITED TO PUBLIC LAW 280 STATES. 12

III. THE ORGANIZED CRIME CONTROL ACT DOES NOT, IN AND OF ITSELF, AUTHORIZE THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS; AN INDEPENDENT JURISDICTIONAL BASIS IS NECESSARY TO DETERMINE WHETHER ON RESERVATION ACTIVITY IS IN VIOLATION OF STATE LAWS UNDER THE ORGANIZED CRIME CONTROL ACT. 15

IV. THE NINTH CIRCUIT'S DECISION DID NOT CONSIDER THE APPLICABILITY OF THE ASSIMILATIVE CRIMES ACT, 18 U.S.C. § 13, AND THIS COURT SHOULD REJECT THE INVITATION TO DO SO AS SUGGESTED BY AMICI

TABLE OF CONTENTS

	Page
CURIAE ARIZONA, NEVADA, AND NEW MEXICO.	17
CONCLUSION	17

TABLE OF CASES

	Page
Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918)	8
Antoine v., Washington, 420 U.S. 194 (1975)	8
Arizona v. California, 373 U.S. 546 (1963)	9
Bryan v. Itasca County, 426 U.S. 373 (1976)	7,8
Carpenter v. Shaw, 280 U.S. 363 (1930)	8
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	7
Ex Parte Crow Dog, 109 U.S. 556 (1883)	7
Fisher v. District Court, 424 U.S. 382 (1976)	9
Jones v. Meehan, 175 U.S. 1 (1899)	7
Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. ___, 85 L.Ed.2d 200 (1985)	10
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)	5
Mattz v. Arnett, 412 U.S. 481 (1973)	8
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)	6,7,8,9
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968)	9
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	10
Pueblo of Santa Ana v. Hodel, No. 85-2688 (D.C. Dist. Court)	2
Rice v. Rehner, 463 U.S. 713 (1983)	7,8,11
Smith v. McCullough, 270 U.S. 456 (1926)	8
South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938)	5, 6
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867)	9
Tulee v. Washington, 315 U.S. 681 (1942)	8
United States v. Kagama, 118 U.S. 375 (1886)	12
United States v. Dakota, 796 F.2d 186 (6th Cir.	

TABLE OF CASES

	Page
1986)	15
United States v. Winans, 198 U.S. 371 (1905)	7
Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979)	
Washington v. Confederated Bands of the Yakima Indian Nation, 439 U.S. 463 (1979)	7
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)	8
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	8, 9
Williams v. Lee, 358 U.S. 217 (1959)	9, 14
Winters v. United States, 207 U.S. 564 (1908)	8, 9
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	7, 9

TABLE OF AUTHORITIES

Federal Statutes:

18 U.S. C. § 1161	7
18 U.S. C. §§ 1961-68	16
Federal Assimilative Crimes Act, 18 U.S.C. § 13	17
Public Law 280, Act of August 15, 1953, ch. 505, §§ 2, 6-7, 67 Stat. 588 (§ 2, now codified at 18 U.S.C. § 1162) (1982); § 6 replaced by 25 U.S.C. § 1323(b) (1982); § 7 expressly repealed by Act of April 11, 1968, P.L. 90-284, § 403(b), 82 Stat. 73, 79, 25 U.S.C. §§ 1321-26 (1982))	12, 13, 14
Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, 1321-1322	14
Indian Reorganization Act of 1934, 25 U.S.C. § 476..	2
Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450(a-n) (1982)	5
The Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871	5

TABLE OF AUTHORITIES

	Page
Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955	15, 16
Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961-68	16
Constitution and Treaties:	
Supremacy Clause, U.S. Const., art. VI, cl. 2	4, 9
Indian Commerce Clause, U.S. Const., art I, § 8, cl. 3	5, 6, 10, 15, 18
Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922	2
Other Authorities:	
Cohen, Handbook of Federal Indian Law, pp. 259-79 (1982 ed.)	9
Clinton "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective", 17 Ariz. L. Rev. 951 (1976)	11
Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdiction Maze," 18 Ariz. L. Rev. 503 (1977)	11
Laurence, "The Indian Commerce Clause," 23 Ariz. L. Rev. 203 (1981)	5, 6
Vollmann, "Criminal Jurisdiction in Indian Country," 22 U. Kan. L. Rev. 387 (1974)	11

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CONSENT TO FILING

The consent to the filing of this Amicus Brief has been obtained from all of the parties hereto. The written consents have been separately filed with the Clerk of this Court under separate cover letter.

INTEREST OF THE AMICI CURIAE

Amici Curiae, the Jicarilla Apache Tribe, the Pueblo of Santa Ana, and the Pueblo of Isleta, are all Indian tribes within the State of New Mexico. The Jicarilla Apache Tribe has a constitutional form of government under the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The Jicarilla Apache Tribe operates on its own, a small bingo game run entirely by members of the Tribe, which is open to participation by both members and non-members alike. The Jicarilla bingo game is operated entirely within the Jicarilla Reservation and is not located near any major urban area within the State of New Mexico. Amici Pueblo of Isleta has treaty rights under the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, and is also organized pursuant to the Indian Reorganization Act with its own constitution. The Pueblo of Isleta operates a bingo game solely within the reservation of the Pueblo, utilizing the revenues for essential governmental purposes. The Pueblo of Isleta is located approximately 10 miles south of Albuquerque, New Mexico. The Pueblo of Santa Ana, which is located approximately 10 miles to the north of Albuquerque, operates under a traditional form of government. It too enjoys rights under the Treaty of Guadalupe Hidalgo. The Pueblo of Santa Ana has proposed the utilization of gaming as a means of generating revenue for the essential governmental services it provides. The Pueblo of Santa Ana is currently in litigation with the Secretary of the Interior over issues involved in said proposed gaming activities. *Pueblo of Santa Ana v. Hodel*, No. 85-2688 (D.C. District Court). The outcome of the cause before this Court would directly affect the Constitutional, treaty and statutory rights of these amici tribes.

SUMMARY OF ARGUMENT

Amici urge this Court to reexamine the context in which cases presenting conflicting state, tribal, and federal interests are decided. Amici respectfully suggest that the re-examination of the conceptual framework under the Indian

Commerce Clause of the United States Constitution would be extremely helpful in resolving admittedly difficult questions. On the other hand, the abstract "balancing test" advocated by the State of California will necessarily generate an enormous amount of litigation to determine the continued validity of many treaties, federal statutes intended to benefit Indian tribes, and other federal policies that affect Indian tribes. This needless confusion can be avoided by adherence to long-standing fundamental principles of jurisdiction and the appropriate exercise of authority over Indian commerce by the Congress of the United States. The state interest, so ardently urged upon this Court by the State of California, provides a compelling reason for the exercise by *Congress* of its legislative authority over Indian commerce pursuant to the Constitution. Congress should enact federal legislation that will regulate Indian commerce involving gambling while at the same time take into appropriate consideration other rights which may be affected and which now exist through various federal treaties and statutes affecting Indian tribes.

Amici urge this Court to uphold the Public Law 280 analysis of the Ninth Circuit. However, in the event that this Court should disagree with the Ninth Circuit's analysis, then it is respectfully submitted that a narrow application of Public Law 280 can resolve the issues in the instant case without unnecessarily affecting Indian tribes, such as amici, whose reservations are within non-Public Law 280 states. The right of Indian tribes to self-determination, economic independence, and self-governance, must be viewed from a realistic perspective which necessarily requires that Indian tribes not be unduly constrained in the exercise of their constitutional and treaty rights to engage in commerce - limited only by the Congress of the United States.

The Organized Crime Control Act does not answer the jurisdictional questions which must first be addressed before a determination can be made of the applicability of said Act. Specifically, the Organized Crime Control Act does not in

and of itself authorize the application of state and local gambling laws on Indian reservations, but rather an independent jurisdictional basis is required in order to determine whether particular on-reservation activity is being conducted in *violation* of state laws as contemplated under the Act.

Lastly, this Court should not accept the suggestion of Amici states of Arizona, Nevada, and New Mexico, to re-examine this case in the light of the Assimilative Crimes Act. The Ninth Circuit did not decide this case based on the Assimilative Crimes Act. This Court should, therefore, review the Ninth Circuit's decision on the basis of the issues contained therein.

If Indian tribes are to be allowed to grow and function as federal policies encourage they must be allowed to make their own determinations of what areas of commerce they will engage in and under what circumstances, without being subjected to the requirement of state approval for each proposed tribal endeavor. The United States Constitution reserves that power to Congress.

ARGUMENT

I

THE SUPREMACY CLAUSE PREEMPTS THE APPLICABILITY OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS

A. The Indian Commerce Clause and the Appropriate Analytical Framework.

Amici respectfully submit to this Court that a proper framework is necessary for the examination of the very difficult issues involved in Indian gambling as a legitimate form of Indian commerce. The Constitution provides:

> This Constitution, and the law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.

U.S. Const., art. VI, cl. 2.

The United States has, since 1871, ceased dealing with Indian tribes through treaties and has since then dealt with tribes by congressional legislation. However, the pre-existing treaties are still valid and binding, and under the Supremacy Clause are part of the law of the land. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). Recent examples of the congressional exercise of its power over Indian tribes as provided for in the Indian Commerce Clause, U.S. Const., art I, § 8, cl. 3, include the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450(a-n) (1982) and the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871. In passing the Indian Self-Determination and Educational Assistance Act, Congress declared "its commitment to the federal government's responsibility to the Indian people for the establishment of a *meaningful* Indian self-determination policy which will permit an orderly transition from federal domination." 25 U.S.C. at § 450(a) (emphasis added). It is clearly federal policy to assist Indian tribes in their ability to achieve economic independence. Before an analysis can be made of the competing interests referred to below, Amici urge this Court to utilize the Indian Commerce Clause analysis articulated by Professor Robert Laurence in "The Indian Commerce Clause," 23 Ariz. L. Rev. 203 (1981) (hereafter Laurence). Professor Laurence's commerce clause analysis requires that state interests be examined in the context of the federal policy to keep commerce free from unreasonable burdens and, in some instances, the need for national uniformity. *Id.* at 217.

Professor Laurence suggests the utilization of the tests for interpreting whether state regulation impermissibly interferes with interstate commerce as articulated in *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938). Laurence at 207-08. The four inquiries required under *Barnwell Bros.* analysis are:

> (1) Whether the state regulation discriminates against interstate commerce; (2) whether the state regulation conflicts with congressional legislation; (3) whether the state acted "within its province"; and (4) whether the regulation is appropriately related to the desired ends.

Laurence, *Id.*, Professor Laurence then demonstrates the application of the *Barnwell Bros.* principles of interstate commerce to the Indian Commerce Clause. Amici respectfully suggest that the analytical framework provided by this approach will properly preserve the jurisdictional analyses heretofore articulated by this Court on issues within the scope of the Indian Commerce Clause. The adoption of this approach will assist in the development of a coherent body of federal Indian jurisdictional law. California's abstract "balancing test", by contrast, requires a case by case review driven by the state claimed urgent state interest. Here, Califoria paints a picture of a state about to be overrun by organized crime. Therefore, it urges this court to allow it to control Indian commerce. Such an approach will create jurisdictional chaos.

B. The "Balancing Test" Advocated by Appellee is not a "Particularized Inquiry" Properly Within a Constitutional Framework.

Although Amici do not disagree with the concern expressed by the State of California, the examination of conflicting interests between the State and Indian tribes cannot be done in a vacuum as suggested by Appellee. Rather, the constitutional framework of the Commerce Clause and the "backdrop of Indian sovereignty", *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), will result in a more rationally developed body of law. On the other hand, if the expansive test advocated by California is applied, this Court may inadvertently provide the tool for the abrogation of Indian constitutional and treaty rights which are no longer consistent with state articulated policy. The Supremacy Clause of the Constitution requires more than a test of state convenience

in determining whether constitutional and treaty rights will remain inviolate. Rather, it is for Congress to address the concern articulated by California. Uniformity and coherence in the law will result. Federalism as expressed in the Indian Commerce Clause will be preserved.

1. The Unrestrained Application of an Abstract "Balancing Test" will Destroy Fundamental Principles of Federalism Embodied in the Constitutionally Defined Relationships Between the United States, Indian Tribes, and the States.

The Appellee argues for an unnecessary expansion of this Court's reasoned decision in *Rice v. Rehner*, 463 U.S. 713 (1983). This Court specifically analyzed the affect of the State's interest in *light of the relevant federal statute* which provided for state liquor law applicability to liquor sales on Indian reservations. 18 U.S.C. § 1161. There is no analogous specific statute involved herein. It is therefore important to summarily review the rules of construction applicable to federal laws and treaties as they pertain to Indian tribes as developed by this Court over the years because federal treaties and statutes will be affected if the unrestrained California "balancing test" is adopted.

To carry out and protect the federal policies underlying treaties and federal statutes which are intended to benefit and protect Indians, this Court has developed the following rules to determine the scope of preemption of state laws. First, treaties with Indian tribes are interpreted as the Indians would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *United States v. Winans*, 198 U.S. 371, 380 (1905); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832). Secondly, treaties and federal statues are to be interpreted in favor of retained tribal self-government and tribal property rights against competing claims under state law. *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976); *McClanahan v.*

Arizona State Tax Comm'n, supra; Ex parte Crow Dog, 109 U.S. 556, 568-70 (1883). Thirdly, doubts and ambiguities in treaties, or statutes, are resolved in the Indians' favor. *Bryan v. Itasca County* at 392; *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *McClanahan* at 174-76; *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Winters v. United States*, 207 U.S. 564, 576-77 (1908). Finally, federal Indian laws are to be liberally interpreted for the purpose of carrying out the protective purpose of such laws. *Antoine* at 200; *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926). This court must, therefore, consider the effect of the intrusive policy urged by California in light of these principles because the California policy, if adopted by this Court, must be analyzed with respect to each tribal treaty and federal statute intended to benefit Indians that it affects.

2. If Adopted, California's Abstract "Balancing Test" Will Have Unforeseen and Unnecessary Impact Upon the Continued Validity of Many Federal Treaties, Statutes and Policies.

California argues for a balancing test without the benefit of the appropriate constitutional framework and further asserts the proposition that Congress has never fully determined whether state laws apply on Indian reservations and cite, in support of their proposition, *Rice v. Rehner, supra*, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The proposition that California asserts is neither accurate, nor would it result in a well-reasoned body of federal Indian law were it to be adopted. To begin with, California misstates the preemption analysis to be a mere balancing of interest test and, further, California equates its "balancing test" with the particularized "inquiry" required in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Secondly, it incorrectly asserts the proposition that state laws apply on Indian reservations unless specifically preempted by federal

law. Therefore, the California argument asserts the "balancing test" is used to determine if a state law is *not* applicable. This fundamental flaw in the reasoning employed by California is contradicted by a well established body of law emanating from the Constitution and consistent with the guiding principles posited by this Court over the years. *See generally,* Cohen, *Handbook of Federal Indian Law,* pp. 259-79 (1982 ed.).

This Court has consistently held that the federal purposes of Indian treaties and stautes are broadly preemptive of state law. *Fisher v. District Court,* 424 U.S. 382 (1976); *McClanahan v. Arizona State Tax Comm'n, supra; Williams v. Lee,* 358 U.S. 217 (1959); *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867); *Worcester v. Georgia, supra.* This preemption, because of the operation of the Supremacy Clause, occurs by implication; express language is not necessary to effect that end. *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968); *Arizona v. California,* 373 U.S. 546, 598-601 (1963); *Winters v. United States, supra.* For example, in *McClanahan,* this Court stated that although the "treaty nowhere explicitly states that the Navajos were to be free from state laws or exempt from state taxes", yet the treaty "was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision". *McClanahan* at 174-75. *See also, White Mountain Apache Tribe v. Bracker, supra* at 136. In the preemption, analysis within an appropriate constitutional framework, this Court has looked to the federal purpose involved. For example, where the issue has been the federal purpose to preserve to tribes the means of self-support, it has been held that this federal purpose preempts state laws which would interfere or limit the tribes' exercise and enjoyment of their means of livelihood. *Washington v. Fishing Vessel Ass'n,* 443 U.S. 658 (1979). Each of the tribal Amici is engaged, pursuant to various federal treaties and statutes, and as authorized by Tribal law, in a variety of commercial activity. Their efforts to become self-sufficient are wholly consistent with federal

policy. The constitutionally informed analysis discussed above precludes the utilization of an abstract balancing test suggested by California to determine whether state law constrains the tribal endeavor.

C. The Post-Proposition 13 Era and the Utilization of Non-Traditional Methods to Raise Governmental Revenues.

The California inspired tax reform (Propostion 13) has reverberated throughout the country. As a direct result, many states have looked to alternative means of raising governmental revenues. The device which many, many states have selected as a supplement to traditional taxation has been the state owned and state run lottery. Indian tribes have been affected by the same types of economic considerations that have affected the states. Along with the diminishment of tax revenues, has been a corresponding diminshment of federally funded programs and services. If Indian tribes are to enjoy the same right to economic survival that states enjoy, they too must be allowed to choose supplements to the traditional methods of taxation for raising revenue. This Court has confirmed the right of Indian tribes to exercise their powers of taxation over both Indian and non-Indian alike pursuant to tribally enacted tax programs. *Kerr McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. _____, 85 L.Ed.2d 200 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Cabazon and Morongo Bands, just as the tribal Amici, seek to avail themselves of alternatives to taxation, *just as states have.* Given that tribes have the right to economic survival and self-sufficiency pursuant to federal policies, it is not for the State of California or the State of New Mexico to decide for the tribes within those states what forms of commercial activity are acceptable to the state. These matters fall squarely within the Indian Commerce Clause and are within the exclusive province of Congress. Many states, such as New Mexico, directly own gambling facilities from which they raise governmental revenues. Others, such as Amici State of Nevada, rely on state sanctioned gambling on a

massive scale to generate income to Nevada. It would be constitutionally impermissible to allow such states to dictate to Indian tribes within their borders the type of commercial activity in which such tribes can engage in order to promote the same type of activity in which the state directly or indirectly participates in and benefits from. In other words, the states cannot be permitted to utilize their governmental power to suppress tribal *governmental* activity designed to raise *governmental* revenues for which the state may be competing.

D. The State Interest Articulated by California Makes a Compelling Argument in Support of the Need for Legislation by Congress to Regulate Indian Commerce Involving Gambling; Abandonment of Long-Standing Fundamental Principles of Jurisdiction is Neither Necessary nor Prudent to Address the State Interest.

California, in articulating its vital interests, makes it fairly clear that they seek to impose the states' determinations of morality on Indian tribes and they further seek to avoid the *risk* of organized criminal infiltration. Calif. Br. at 29. The chaos which will result by substituting this type of alarmist concern for the public well-being instead of traditional jurisdictional analyses are obvious. *See generally,* Clinton, "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective", 17 Ariz. L. Rev. 951 (1976); Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze," 18 Ariz. L. Rev. 503 (1977); Vollmann, "Criminal Jurisdiction in Indian Country," 22 U. Kan. L. Rev. 387 (1974).

The limitation that California suggests that Indian tribes be compelled to adhere to, namely, participation in only "traditional" pursuits (presumably fishing, hunting, and a subsistence level of agriculture) is an unwarranted extension of the use of that term by this Court in *Rice v. Rehner.* Rather, the Court below properly took the view that it is a

traditional function of tribal governments, just as state governments, to provide revenues and engage in activities to generate those revenues for the purpose of fulfilling legitimate governmental functions. To hold otherwise would freeze Indian tribes into subsistence living with respect to their on-reservation activities of the 19th century. That restrictive view of Indian commerce neither comports with constitutional concepts of commerce nor federal policies of Indian self-determination. This Court, therefore, should reject the suggested use of such a narrow test as advocated by the Appellee.

The state interest which California expounds on at length (of concern for the influx of organized crime) is more properly dealt with by Congress. California acknowledges that "the *existence* of organized crime is not relative to the jurisdictional question anyway." Calif. Br. at 29-30, n. 17. *A fortiori*, the *fear of the existence* of organized crime is not relevant to the jurisdictional question either. It is, therefore, essential that this Court reject California's invitation to abandon long-standing and fundamental principles of jurisdiction. As this Court has in the past rejected invitations to "legislate" so too should it do so now. *See, United States v. Kagama*, 118 U.S. 375 (1886).

II

PUBLIC LAW 280 DOES NOT AUTHORIZE THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS WHERE THE STATE PERMITS BUT REGULATES A PARTICULAR GAMBLING ACTIVITY; IF THE COURT SHOULD DISAGREE WITH THE NINTH CIRCUIT'S PUBLIC LAW 280 ANALYSIS THEN THIS COURT'S RULING SHOULD BE LIMITED TO PUBLIC LAW 280 STATES

California asserts the proposition that California has common law jurisdiction over Indian reservations - as such jurisdiction is defined by its "common law balancing tests". Further, California asserts that Public Law 280 grants it

authority to exercise certain limited civil and criminal jurisdiction over Indian reservations. California concludes with the proposition that argues that Public Law 280 was intended to *broaden* their common law jurisdiction over Indian reservations. Calif. Br. at 33.

Although California cites no authority for its assertion that it had common law jurisdiction over Indian reservations unless expressly preempted, that position is wholly inconsistent with the perceived need for the passage of Public Law 280 which California correctly states only granted to certain states *limited* civil and criminal jurisdiction under certain circumstances. The very reason why Congress determined it to be necessary to pass Public Law 280, was that state laws, as a general rule, were inapplicable to Indian reservations. Cohen, *Handbook of Federal Indian Law*, at 269. This need for federal legislation to grant limited jurisdiction to states over criminal and civil actions within Indian reservations cannot be reconciled with California's other assertion that Public Law 280 was intended to broaden its jursidiction by granting it certain limited jurisdiction.

If California's premise (that its law already was applicable to reservation activity through some sort of federal common law) is accurate then Public Law 280 was wholly unnecessary. Obviously, Congress took a different view. Amici suggest to this Court the better reasoned view of Public Law 280 jurisdiction is that of the Ninth Circuit, and respectfully suggest that its analysis should be followed. It is especially important to note that California seems to clearly indicate that it wishes to use the vehicle of either claimed federal common law jurisdiction or Public Law 280 jurisdiction to impose upon Indian tribes California's notions of morality and requisite conformance to social standards as articulated by the State from time to time. This is precisely the type of intrusion that led Congress to amend Public Law 280 to require tribal consent.

Public Law 280, as orginally passed, gave federal consent to the assumption of limited criminal and civil jurisdiction over Indian territory, and automatically conferred such jurisdiction on certain enumerated states, which included California. Pub.L. 280, Act of August 15, 1953, ch. 505, §§ 2, 6-7, 67, Stat. 588 (§ 2, now codified at 18 U.S.C. §1162 (1982); § 6 replaced by 25 U.S.C. §1323(b) (1982); 7 expressly repealed by Act of April 11, 1968, Pub.L. 90-284, § 403(b), 82 Stat. 73, 79; 25 U.S.C. §§ 1321-26 (1982)). Part of the Indian Civil Rights Act of 1968, added the requirement that consent of the affected tribes by special vote of tribal membership was a necessary condition precedent to the assumption of state jurisdiction over Indian lands 25 U.S.C. § 1321-22. Since this enactment in 1968 no state has obtained tribal consent. Thus, allowing state jurisdiction over Indian reservation gambling as advocated by California would violate the 1968 Indian Civil Rights Act and would vitiate the congressional purpose behind Public Law 280 as amended by that Act. It is worth noting also, from the perspective of the Pueblos of Isleta and Santa Ana, and the Jicarilla Apache Tribe, that New Mexico had an opportunity to assume Public Law 280 jurisdiction and elected not to do so. There were many such states that were reluctant to assume such jurisdiction because of the additional burdens it would impose on states and state court dockets which were perceived to be already burdened. *Williams v. Lee*, 358 U.S. 217, 222-23, n. 10 (1959), *citing*, H.R. Rep. No. 848, 83rd Cong., 1st Sess. 3, 7 (1953); Secretary of the Interior Ann. Rep. (1955) at 247-48; Secretary of the Interior Ann. Rep. (1956) at 215-16; Secretary of the Interior Ann. Rep. (1957) at 253-54. An unnecessarily broad ruling accepting the incongruous argument asserted by the State of California would grant broad jurisdiction to states, such as New Mexico, that elected not to assume such jurisdiction. And, as mentioned, would also violate the rights of Indian tribes under the 1968 Indian Civil Rights Act.

However, to the extent that this Court should determine that Public Law 280, as it applies in California, does grant jurisdiction to California to apply its law to on-reservation activity, such as bingo, then this Court's ruling should be limited to Public Law 280 states. As California points out, there are no treaty tribes in California and the treaty issues, therefore, are not present in the analysis of the instant case. Calif. Br. at 10, fn. 4. Many New Mexico tribes like the Pueblo of Isleta and the Pueblo of Santa Ana are affected by such treaty considerations. The Supremacy Clause questions and concerns which would exist in analyzing the effect of the broad ruling suggested by California present an additional reason to rule as narrowly as possible on this question.

III

THE ORGANIZED CRIME CONTROL ACT DOES NOT, IN AND OF ITSELF, AUTHORIZE THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS; AN INDEPENDENT JURISDICTIONAL BASIS IS NECESSARY TO DETERMINE WHETHER ON-RESERVATION ACTIVITY IS IN VIOLATION OF STATE LAWS UNDER THE ORGANIZED CRIME CONTROL ACT

The recent Sixth Circuit decision in *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986), applied the Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955, to on-reservation gambling activities. California claims that the Act "by its terms makes state gambling laws applicable on Indian reservations". Calif. Br. at 41. This is not so. The Act does not expressly apply to Indian reservations. It does make certain acts which are violations of state law also a federal crime. But it does not create the jurisdictional predicate California seeks in order for gaming on Indian reservations to be a violation of California law and thus of the Act. There must be an independent basis for California jurisdiction. California essentially asks this Court to adopt this boot strap argument. To belabor the obvious for a moment, does a

gambling operation in the State of Nevada violate California state law and thus, become a violation of the Organized Crime Control Act? The obvious answer to this questions is no, and the reason this is so is because California law does not apply in Nevada. California has no jurisdiction over activities in Nevada even through Nevada gambling activities clearly impact California. Similarly, unless it can be determined that California law applies to gambling on Indian reservations independent of the Organized Crime Control Act, those reservation actions which would ostensibly "violate" California law do not in fact do so and do not constitute a violation of the Organized Crime Control Act simply because the jurisdictional predicate is absent.

California extends its argument to simply untenable lengths when it argues that before an Indian tribe may engage in *any* type of commercial activity or economical development enterprise, it may do so only after Congress has enunciated a policy that expressly permits the particular acitivity in question. Calif. Br. at 30-33. While it is true that the Constitution does not expressly grant Indian tribes the right to engage in Bingo to raise governmental revenues, so too is it true that the Constitution does not expressly reserve unto states a right to raise governmental revenue by running state owned lotteries. The Constitution, does by necessary implication, provides for the right of Indian tribes, to engage in commerce, (Const. art. I, § 8, cl. 3) subject to regulation by Congress. That bingo games run by Indian tribes are "commerce" within this Court's many interpretations of the constitutional concept of commerce, is too self-evident a proposition to allow for serious disagreement. The Organized Crime Control Act quiet simply does not afford the State of California jurisdiction to impose its laws on Indian Commerce Clause reservation activity which might otherwise be a violation of State law were California to be possessed of jurisdiction over the activity at issue.

Moreover, the very existence of federal statutes such as the Organized Crime Control Act, and the Racketeer

Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961-68, are strongly suggestive of two things with respect to organized crime and racketeering. First, states have historically been impotent to effectively deal with organized criminal activity. Secondly, the problem of organized crime is really a national problem which requires federal legislation and law enforcement. This reality compels the conclusion that the appropriate and constitutionally required arena for a resolution of Indian gambling and the attendant potential problem of organized criminal activity is the Congress of the United States.

IV

THE NINTH CIRCUIT'S DECISION DID NOT CONSIDER THE APPLICABILITY OF THE ASSIMILATIVE CRIMES ACT, 18 U.S.C. § 13, AND THIS COURT SHOULD REJECT THE INVITATION TO DO SO AS SUGGESTED BY AMICI CURIAE ARIZONA, NEVADA, AND NEW MEXICO

The brief of Amici States of Arizona, Nevada, and New Mexico, filed herein in support of the State of California, discusses at great length the history of the Federal Assimilative Crimes Act, 18 U.S.C. § 13. Ariz Br. at 9-28. This Court should, nevertheless, decline the invitation to review this case in light of the Assimilative Crimes Act as the Ninth Circuit did not decide the case on that basis. As that Act was not the basis of the decision below, tribal Amici think it appropriate for this Court to refrain from analyzing the issues in light of that Act. In fact, the tribal Amici would agree with the views of Arizona, Nevada, and New Mexico, that any ruling on the merits of this case should be narrowly drawn so as not to inadvertently impact upon the very separate issues with which these Amici Curiae tribes are involved vis á vis the State of New Mexico. *Id.* at 28.

CONCLUSION

The problems presented by the State of California with respect to the legitimate concerns for the state interest in organized crime are compelling reason for immediate

attention and action by the Congress of the United States pursuant to its plenary authority over Indian affairs. Those reasons advocated by the State, however, are not adequate to depart from long-standing and well-reasoned principles of jurisdiction within the constitutional framework of the Indian Commerce Clause, and traditional rules pertaining to federal preemption and the sovereign rights of Indian tribes.

Amici Curiae tribes strongly urge this Court to avoid embarking on the uncertainties which would be attendant to the adoption of an unrestrained "balancing test" as advocated by the State of California. The treaty rights, constitutional rights, and federal statutory rights affecting Indian tribes would be thrown into a state of uncertainty by the adoption of such an ill-conceived "test". This Court has always firmly ground its decisions regarding the jurisdiction of states over affairs on Indian reservations on fundamental principles of the Supremacy Clause of the Constitution. To the extent that a balancing test has been employed within the framework of the Supremacy Clause, then effects on federal laws and policy and infringement on the rights of Indian tribes to self-determination and self-governance have been the next levels of inquiry.

Indian tribes should not be precluded from engaging in various forms of commerce intended to provide th tribes with needed revenues to provide legitimate governmental services. Indeed, the Indian Commerce Clause of the Constitution contemplates just such activity. For these reasons, this Court should affirm the ruling of the Court of Appeals for the Ninth Circuit.

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